



Agenda Date: 6/22/05  
Agenda Item: 2B

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
**Two Gateway Center**  
**Newark, NJ 07102**  
**www.bpu.state.nj.us**

**ENERGY**

IN THE MATTER OF THE JOINT PETITION  
OF PUBLIC SERVICE ELECTRIC AND GAS  
COMPANY AND EXELON CORPORATION  
FOR APPROVAL OF A CHANGE IN CONTROL )  
OF PUBLIC SERVICE ELECTRIC AND GAS )  
COMPANY, AND RELATED AUTHORIZATIONS

ORDER ON STANDARD OF  
REVIEW

BPU DOCKET NO. EM05020106  
OAL DOCKET NO. PUC1874-05

(SERVICE LIST ATTACHED)

BY THE BOARD:

The Board of Public Utilities ("Board"), by this Order, addresses the issue of the standard of review to be applied in rendering its determination on the requests for Board approvals, authorizations and other relief sought by the Verified Joint Petition in the above-referenced matter. As discussed more fully below, the Board issues this Order after affording the parties an opportunity to submit comments and reply comments on the standard of review which the Board should apply in considering the Verified Joint Petition in the above-captioned matter, and after careful consideration of all submissions made in this regard.

**BACKGROUND/ PROCEDURAL HISTORY**

By Verified Joint Petition filed with the Board on February 4, 2005, and thereafter supplemented by letters dated February 7, 9, and 28, 2005, Public Service Electric and Gas Company ("PSE&G") and Exelon Corporation ("Exelon") (collectively "Joint Petitioners"), request that the Board issue an Order: 1) approving the acquisition of control of PSE&G as contemplated by an Agreement and Plan of Merger between Exelon and Public Service Enterprise Group Incorporated ("PSEG"), dated as of December 20, 2004 (Exhibit JP-1C); 2) authorizing Exelon's subsidiary Exelon Energy Delivery Company, LLC ("Exelon Energy Delivery") to acquire control of PSE&G, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10; 3) authorizing the recording of a regulatory asset to offset the purchase accounting adjustments resulting in an increase in the balance sheet liabilities for PSE&G's pension and other post retirement benefits plans; 4) approving a General Services Agreement and Mutual Services Agreement (Exhibits JP-1E and 1F) pursuant to N.J.S.A. 48:3-7.1; and 5) approving PSE&G's execution of and action in accordance with the Exelon Utility Money Pool Agreement (Exhibit JP-1G) pursuant to N.J.S.A. 48:3-7.2. The Verified Joint Petition also requests that the Board's Order include a determination that the Board has sufficient regulatory authority, resources and access to the

books and records of PSE&G and any relevant associate, affiliate or subsidiary company to exercise its duties, and that, post-merger, participation by any affiliate or associate company of PSE&G that is an exempt wholesale generator ("EWG") in the Basic Generation Service ("BGS") process will benefit consumers, does not violate any State law, would not provide the EWG any unfair competitive advantage by virtue of its affiliation or association with PSE&G, and is in the public interest. The Verified Joint Petition also requests that the Board submit a letter to the Securities and Exchange Commission ("SEC") in the form attached to the Verified Joint Petition as Exhibit JP-1H, which proposes that, with regard to a request by Exelon to increase its SEC authorization under the Public Utility Holding Company Act of 1935 ("PUHCA") for its total investment in EWGs and foreign utility companies ("FUCOs") from the currently authorized aggregate level of \$4 billion to a post-merger aggregate level of \$7 billion, the Board inform the SEC that the Board "has the authority and resources to protect the ratepayers of PSE&G subject to its jurisdiction and that it intends to exercise its authority to protect PSE&G and the ratepayers of PSE&G." The Verified Joint Petition is verified on behalf of Exelon by Elizabeth Moler, Executive Vice President of Exelon, and on behalf of PSE&G by R. Edwin Selover, Senior Vice President and General Counsel of PSE&G, and is supported by direct testimony in Exhibits JP-2 through JP-7 thereto.<sup>1</sup>

The Verified Joint Petition and the direct testimony describe the parties to the proposed acquisition of control and related agreements. PSE&G, a corporation organized and existing under the laws of the State of New Jersey and a wholly-owned subsidiary of PSEG, is engaged principally in the transmission and distribution of electric energy and gas service in New Jersey. PSE&G is both an electric public utility and a gas public utility subject to regulation by the Board. PSE&G has approximately 2.0 million electric customers and 1.6 million gas customers in a service area of approximately 2,600 square miles running diagonally across New Jersey from Bergen County in the northeast to an area below the City of Camden in the southwest. The greater portion of this area is served with both electricity and gas, but some parts are served with electricity only and other parts with gas only. Verified Joint Petition at ¶¶1; Exhibit JP-6 at 12. PSE&G also provides BGS and basic gas supply service ("BGSS") to its customers who, respectively, have not chosen an alternative electric power supplier or alternative gas supplier. PSE&G secures the wholesale requirements for its supply of BGS through a Board-approved

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<sup>1</sup> The testimony filed with the Verified Joint Petition was later supplemented and revised in certain respects, such that, as of the Board's June 22, 2005 agenda meeting, the following constituted the prefiled testimony: Exhibit JP-2, Direct Testimony of John W. Rowe, Exelon's Chairman, President and Chief Executive Officer; Exhibit JP-3, Direct Testimony of Ralph Izzo, PSE&G's President and Chief Operating Officer; Exhibit JP-4, Direct Testimony of J. Barry Mitchell, Exelon's Senior Vice President, Treasurer and Business Unit Chief Financial Officer; Exhibit JP-5, Direct Testimony of William Arndt, Exelon's Senior Vice President, Business Operations; Exhibit JP-6, Direct Testimony of Rodney Frame, Managing Principal of Analysis Group, Inc.; and Exhibit JP-7, Direct Testimony of Pamela B. Strobel, Exelon's Executive Vice President and Chief Administrative Officer, and President of Exelon Business Services Company. The Board notes that thereafter, by letters dated August 3, 2005 and September 28, 2005 to Administrative Law Judge Richard McGill, the Joint Petitioners submitted Exhibit JP-7A, Direct Testimony of Ruth Ann M. Gillis, Senior Vice President of Exelon and President of Exelon Service Company, adopting the testimony of Pamela B. Strobel, who will be retiring prior to the hearings to be held in this matter. The Board also notes that by letter dated August 15, 2005 to Board Secretary Kristi Izzo, the Joint Petitioners submitted the following testimonies: Exhibit JP-6, Additional Direct Testimony of Rodney Frame; Exhibit JP-8, Direct Testimony of E. James Ferland, PSEG's Chairman, Chief Executive Officer and President, and Thomas M. O'Flynn, PSEG's Executive Vice President and Chief Financial Officer; Exhibit JP-9, Direct Testimony of Frank Cassidy, President and Chief Operating Officer of PSEG Power, LLC; and Exhibit JP-10, Direct Testimony of Kenneth W. Cornew, Senior Vice President of Power Transactions for Exelon Generation Company, LLC.

auction process. Exhibit JP-6 at 12. PSE&G has turned over the operational control of its electric transmission system to PJM Interconnection, LLC ("PJM"), the Regional Transmission Organization ("RTO") approved by the Federal Energy Regulatory Commission ("FERC") for a centrally dispatched control area comprising all or parts of several states, including New Jersey, and the District of Columbia. Verified Joint Petition at ¶1.

PSEG, the parent of PSE&G, also is a corporation organized and existing under the laws of the State of New Jersey and presently is an exempt public utility holding company under PUHCA. Id. at ¶2. The common stock of PSEG is publicly traded and is listed on the New York Stock Exchange. Ibid. In addition to PSE&G, PSEG has three other principal direct wholly-owned subsidiaries: PSEG Power LLC ("PSEG Power"), described by the Verified Joint Petition as a multi-regional, wholesale energy supply company that includes generating asset operations, as well as wholesale energy, fuel supply, energy trading and marketing and risk management functions; PSEG Energy Holdings LLC ("PSEG Energy Holdings"), described by the Verified Joint Petition as having pursued investment opportunities in the global energy markets; and PSEG Services Corporation ("PSEG Services"), described by the Verified Joint Petition as providing corporate support, managerial and administrative services to PSEG and its subsidiaries. Verified Joint Petition at ¶2. PSEG Power, in turn, is described by Exhibit JP-6 as having three principal subsidiaries: PSEG Nuclear LLC ("PSEG Nuclear"), PSEG Fossil LLC ("PSEG Fossil") and PSEG Energy Resources & Trade LLC ("PSEG ER&T"). PSEG Nuclear has an ownership interest in five nuclear generating units and operates three of them: the Salem Nuclear Generating Station, Units 1 and 2, each of which is owned 57.41% by PSEG Nuclear and 42.59% by Exelon Generation Company LLC ("Exelon Generation"), and the Hope Creek Nuclear Generating Station, which it owns 100%, while Peach Bottom Atomic Power Station Units 2 and 3, each of which is 50% owned by PSEG Nuclear, are operated by Exelon Generation. Exelon Corporation Form S-4 (Registration Statement under the Securities Act of 1933), Amendment No. 3, filed with Securities and Exchange Commission on May 27, 2005, Registration No. 333-122704 ("Form S-4") at 38.<sup>2</sup> PSEG Fossil develops, owns and operates domestic fossil and other non-nuclear generating stations. PSEG ER&T, among other things, markets the capacity and energy from the generation owned by PSEG Nuclear and PSEG Fossil and has been a successful participant in the BGS auctions, with a load obligation for the summer of 2006 in excess of 5,000 MW. Exhibit JP-6 at 12-13 and Exhibit RF-3 thereto at 1-2. PSEG Power and PSEG Global, through their subsidiaries, own approximately 18,000 MW of generation capacity in the United States, of which approximately 14,000 MW is in PJM. Exhibit JP-6 at 13.

Exelon is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and is a registered holding company under PUHCA. Verified Joint Petition at ¶3. The common stock of Exelon is publicly traded and is listed on the New York Stock Exchange. Ibid. According to the Verified Joint Petition, Exelon, through its subsidiaries, operates in three business segments, which have been denominated Energy Delivery, Generation and Enterprises, and, through a subsidiary service company, provides business services to the consolidated group. Ibid.

As described by the Verified Joint Petition, Exelon's energy delivery business is conducted through its second-tier subsidiaries PECO Energy Company ("PECO") and Commonwealth Edison Company ("ComEd"), whose immediate parent is Exelon Energy Delivery. Verified Joint Petition at ¶4. PECO is engaged in the business of supplying, transmitting and distributing electricity and natural gas and furnishes retail electric and natural gas service in several

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<sup>2</sup>Form S-4 is referenced in the Verified Joint Petition at ¶43.

counties in Pennsylvania. Ibid. PECO's retail service territory has an area of approximately 2,100 square miles and an estimated population of 3.8 million. PECO provides electric delivery service in an area of approximately 2,000 square miles, with a population of approximately 3.7 million, including 1.5 million in the City of Philadelphia. Natural gas service is supplied in an area of approximately 1,900 square miles in southeastern Pennsylvania adjacent to the City of Philadelphia, with a population of approximately 2.3 million. PECO delivers electricity to approximately 1.5 million customers and natural gas to approximately 460,000 customers. Form S-4 at 37. ComEd is engaged in the business of supplying, transmitting and distributing electricity in Northern Illinois and, through a wholly owned subsidiary, provides electric transmission service in portions of Indiana. Verified Joint Petition at ¶4. ComEd's retail service territory has an area of approximately 11,300 square miles and an estimated population of 8 million, which includes the City of Chicago, an area of about 225 square miles with an estimated population of 3 million. ComEd has approximately 3.76 million customers. Form S-4 at 37. PECO and ComEd also have turned over operational control of their electric transmission systems to PJM. Verified Joint Petition at ¶4.

The Verified Joint Petition further describes that Exelon's generation business consists of electric generating facilities that Exelon Generation owns or has under contract. Verified Joint Petition at ¶5. These facilities have a net capacity of approximately 33,000 MW, of which approximately 21,000 MW is located in PJM. Of this amount, 7,180 MW is in PJM East, described by the Joint Petitioners as the area in PJM that is located, in an electrical sense, to the east of PJM's Eastern Interface. Exhibit JP-6 at 5, 14. Exelon has ownership interests in ten nuclear generating stations comprised of seventeen individual units, and its nuclear holdings include interests in the Salem and Peach Bottom stations, which are owned jointly with PSEG Nuclear. Id. at 14. Exelon's generation business also includes the wholesale energy marketing operations of Exelon Generation and the competitive retail sales business of Exelon Energy Company. Verified Joint Petition at ¶5. In addition to Exelon's three business segments, Exelon Business Services Company ("Exelon BSC"), a first-tier subsidiary of Exelon, provides Exelon and its subsidiaries with advisory, professional, technical and other services. Id. at ¶6.

The Verified Joint Petition also provides an overview of the proposed transaction at ¶¶7-13. Pursuant to the terms of the Merger Agreement attached to the Verified Joint Petition as Exhibit JP-1C, PSEG will merge into Exelon, thereby ending the separate corporate existence of PSEG. Each PSEG shareholder will be entitled to receive 1.225 shares of Exelon common stock for each PSEG share held and will be paid cash in lieu of any fractional share of Exelon stock the PSEG shareholder would otherwise be entitled to receive. As proposed, Exelon, which will be renamed Exelon Electric & Gas Corporation ("EE&G"), will be the surviving company, remain the ultimate corporate parent of PECO and ComEd and the other Exelon subsidiaries and become the ultimate corporate parent of PSE&G and the other surviving PSEG subsidiaries. Verified Joint Petition at ¶7. Under the proposed transaction, ComEd, PECO and PSE&G will continue to be operating public utility companies. The Verified Joint Petition proposes that EE&G will remain headquartered in Chicago, with electric generation headquarters in Newark, New Jersey, and energy trading and nuclear divisions headquartered in southeastern Pennsylvania. The Verified Joint Petition also proposes that PSE&G will remain headquartered in Newark, with PECO and ComEd remaining headquartered in Philadelphia and Chicago, respectively. Id. at ¶8.

The Verified Joint Petition also indicates that EE&G will assume all of PSE&G's outstanding indebtedness, that the indebtedness of PSE&G will not be assumed or guaranteed by EE&G and will remain the obligation of PSE&G and any of the guarantors of such indebtedness; and that the proposed merger will not change the terms or character of PSE&G or any Exelon

subsidiary's outstanding preferred stock or other indebtedness, which will continue to be outstanding. Id. at ¶¶9 and 10.

The Verified Joint Petition further states that after the proposed merger, EE&G will increase the number of Directors on its Board of Directors to eighteen and will appoint six former PSEG Directors designated by the former PSEG Chief Executive Officer to fill six Directors' seats. Id. at ¶11. Additionally, the Verified Joint Petition indicates that the following will hold offices after the merger: John W. Rowe, the current Chairman, Chief Executive Officer and President of Exelon, will serve as Chief Executive Officer and President of Exelon; E. James Ferland, the current Chairman, Chief Executive Officer and President of PSEG, will become the non-executive Chairman of the Exelon Board of Directors and upon his departure from the Board of Directors, John W. Rowe will assume the Chairmanship; and Ralph Izzo, PSE&G's current President and Chief Operating Officer will remain in that position. Id. at ¶12.

In addition to the changes resulting from the Merger Agreement, the Joint Petitioners propose to revise their corporate structure so that, among other changes, PSE&G will become a direct subsidiary of Exelon Energy Delivery, which, as noted above, is, in turn, a direct subsidiary of Exelon and the parent of ComEd and PECO, with PSE&G's current subsidiaries remaining intact. They also propose that PSEG Services will sell all of its assets to Exelon Business Services Company and remain as a non-energy entity, and that post-merger, Exelon Business Services Company will be the sole service company of EE&G. Id. at ¶13.

In a section of the Verified Joint Petition captioned "Benefits of the Merger," at ¶14, the Joint Petitioners assert that the proposed merger "will create a company with substantial resources and capabilities that will serve over seven million retail electric customers and two million retail gas customers in three states" and that "[b]y sharing resources and best practices, the proposed Merger is expected to enhance operations and strengthen the combined ability of Exelon's utility subsidiaries to provide cost-effective, safe and reliable service and will affirmatively promote the public interest in a number of substantial ways." These are enumerated as including: increased scale and scope; anticipated financial strength and flexibility; sharing of best practices; synergies; commitment to competition; impact on customers, employees, and suppliers; and impact on communities served. Verified Joint Petition at ¶14(a)-(g).

The Verified Joint Petition also includes, among other sections, a section pertaining to ¶¶21-37 captioned "Regulatory Standards for Approval." In this section, the Verified Joint Petition asserts that "[t]he Board has long established that the governing standard under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 for its approval of the acquisition of control of a New Jersey public utility is that the proposed transaction 'will not adversely impact upon' the financial integrity of the New Jersey utility...and will result in 'no harm' or 'no adverse impact' on the four areas specified in N.J.S.A. 48:2-51.1," i.e., competition, the rates of ratepayers affected by the acquisition of control, the employees of the affected public utility, and the provision of safe and adequate utility service at just and reasonable rates. Verified Joint Petition at ¶21 (citation omitted). The Verified Joint Petition claims that the petitioned-for change in control satisfies the no harm standard for reasons set forth in ¶¶ 22-37.

By letter dated February 18, 2005, the Board transmitted the Verified Joint Petition to the Office of Administrative Law ("OAL"), where it was assigned to Administrative Law Judge ("ALJ") Richard McGill. After the holding of a prehearing conference, ALJ McGill issued a Prehearing Order on April 5, 2005. Among other matters, the Prehearing Order set forth the nature of proceeding and issues to be resolved, but did not indicate that an issue to be addressed is the standard of review. In response to ALJ McGill's Prehearing Order, Board Staff submitted a

letter dated April 15, 2005, in which it stated, among other things, that "as indicated at the prehearing conference, Staff anticipates that the standard of review may be at issue."

At its May 5, 2005 agenda meeting, the Board, noting that there had to date been no schedule established for disposition of this issue before the ALJ, determined to recall the standard of review issue from the OAL and established a schedule to afford an opportunity for parties to be heard on the standard of review issue through the submission of briefs prior to the Board ruling thereon. ALJ McGill and the Service List were notified by Secretary's letter dated May 5, 2005 of the Board's recall of the standard of review issue and that initial briefs by any party wishing to be heard on the standard of review should be submitted by May 26, 2005, with reply briefs by June 6, 2005.

At its June 22, 2005 agenda meeting, the Board considered the submissions of the parties, which are summarized below, and rendered its determination regarding the standard of review to be applied in reviewing the Verified Joint Petition in the within matter. This Order memorializes that decision.

## **INITIAL COMMENTS**

### **Joint Petitioners**

The Joint Petitioners argue that a no harm standard should be applied in the review of their Verified Joint Petition. They maintain that in the majority of mergers and acquisitions the Board has considered, including all recent electric utility transactions, a no harm standard has been used to conduct the evaluation required under N.J.S.A. 48:2-51.1. Joint Petitioners Initial Brief at 1-2. They assert that it would be inappropriate, before the development of any factual record, to depart from the no harm standard, which they claim has served the Board satisfactorily in many cases. Id. at 2. The Joint Petitioners further allege that any decision to depart from what they refer to as the settled no harm standard would create unnecessary confusion and would be arbitrary. Ibid. The Joint Petitioners assert that application of the no harm standard in prior cases reflects a practical balancing approach based on the totality of the evidence that the Board should continue to apply here. Id. at 3. They contend that application of the standard requiring no adverse impact on the criteria in N.J.S.A. 48:2-51.1, such as employees of the affected public utility, does not mean that the standard cannot be satisfied if the elimination of a single utility employee position is anticipated. Ibid.

The Joint Petitioners also argue that when the Board has applied a positive benefits standard, special circumstances were present, which they claim are not relevant here. Id. at 4. The Joint Petitioners also contend that even when the Board has used a positive benefits standard, it has followed virtually the same balancing test as applied in the no harm cases. Id. at 6. The Joint Petitioners further argue that there is not clear guidance as to how a positive benefits test would work under the circumstances of this case, which they argue does not involve operational or financial difficulties threatening to impair service. Hence, the Joint Petitioners argue that it is unclear what the aim of a positive benefits standard would be in the within matter. Ibid. They contend that without a factual record in place, it is difficult to see how the within matter should be distinguished from other electric company merger proceedings in which the Board applied a no harm standard. Ibid. The Joint Petitioners conclude by arguing that although they will show that there are positive benefits arising from this transaction, the imposition of a positive benefits standard in the within matter, in which they claim there is no evidence supporting the need for such a standard nor any direction as to how it would be applied, would be inconsistent with Board precedent and arbitrary. Id. at 6-7. They assert that the no harm standard will allow the

Board to consider all impacts of the proposed transaction, including the positive benefits, and ensure the continued provision of safe and adequate service at just and reasonable rates. Id. at 6.

### **Ratepayer Advocate**

The Division of the Ratepayer Advocate (“RPA” or “Ratepayer Advocate”) asserts that the proper standard to be used in evaluating the merits of the transaction at issue herein is that of “positive benefit to the public interest.” RPA Initial Brief at 1. The RPA notes that the positive benefits standard has its origins in merger or “takeover” cases affecting the internal structure of existing New Jersey utilities and that under this standard, also referred to as the “best interest of the public” or “of positive benefit to the public interest,” the petitioners are required to demonstrate benefits that would accrue to ratepayers if a proposed transfer of control is approved. Id. at 5. The RPA asserts that the Board has applied the no adverse impact standard with regard to proposed acquisitions not significantly affecting the utility’s internal structure and that recent merger cases indicate the Board’s reluctance to adopt a universal standard of review. Id. at 6. The RPA notes that the Board has articulated a no adverse impact standard in certain recent merger cases but also notes that in the Board’s Order in its most recent merger proceeding, Order of Approval, I/MO Petition of NUI Utilities, Inc. (d/b/a/ Elizabethtown Gas Company) and AGL Resources Inc. for Authority under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 of a Change in Ownership and Control (“NUI”), Docket No. GM04070721 (November 17, 2004), the Board explicitly required the petitioners to demonstrate positive benefits as a condition for approval. Id. at 7. The RPA also argues that even prior to NUI, the Board had indicated a trend towards positive benefits as a condition precedent to merger approval, and cite in support thereof to Commissioner Butler’s dissent in I/M/O the Joint Petition of FirstEnergy Corp. and Jersey Central Power & Light Co., d/b/a GPU Energy, for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief (“FirstEnergy”), Docket No. EM00110870 (October 9, 2001), in which he explained that he was not convinced that approval of the proposed acquisition was in the public interest and in his view the proposed acquisition “provide[d] no real benefit to the ratepayers.” Id. at 7.

The RPA further asserts that regardless of the articulated standard of review, the Board has required that positive benefits flow to customers as a prerequisite of merger approval. Ibid. The RPA contends that the Board should explicitly mandate a demonstration of positive benefits by the Joint Petitioners because of the Board’s history of requiring utilities to implement positive benefits and what it refers to as the unique circumstances involved in the proposed integration of PSE&G into Exelon, which the RPA identifies as a sale to a foreign company of one of New Jersey’s most prominent corporations with a statutory obligation to serve its customers and the acknowledged creation of significant market power in the PJM area most relevant to the BGS auction. Id. at 9-10. Noting that the purpose of the Electric Discount and Energy Competition Act (“EDECA”), N.J.S.A. 48:3-49 et seq., was to create a competitive retail market, the RPA submits that the merger “must actively encourage competition, not merely fail to destroy it completely.” Id. at 10. It further argues that PSE&G’s ratepayers, not only its shareholders, should benefit from resulting synergies of the \$79 billion transaction. Ibid. In discussing the employee prong of N.J.S.A. 48:2-51.1, the RPA asserts that “the Board should review the Joint Petitioners’ plans regarding Public Service’s employees on a positive benefits standard; otherwise, many employees will surely be harmed.” Id. at 11. The RPA also maintains that the Board should insist on improvements in safety and reliability, not merely avoidance of deterioration. Ibid. Noting that in their petition, the Joint Petitioners, themselves, offer a detailed explanation of how the proposed merger will potentially benefit the public interest, the RPA argues that this reflects an implicit understanding that utilities must show the positive

benefits of any proposed merger. Id. at 12. The RPA urges the Board to require the Joint Petitioners to substantiate this representation by evaluating the Verified Joint Petition under a positive benefits standard of review. Ibid.

### **Board Staff**

Board Staff urges the Board to apply the positive benefit standard to the Verified Joint Petition. Board Staff Initial Brief at 1. Board Staff notes that in applying the applicable law in its review of mergers, the Board's approach, necessarily reflecting the extremely fact-sensitive nature of the proceedings, has not been monolithic. Id. at 2. It further notes that as is being done in the within matter, the determination of the standard of review has been identified and litigated in each proceeding on a case-by-case basis, with arguments generally having centered on a no-harm standard and a positive benefits standard. Ibid. Board Staff points out that the Board recently found that, although generally it had relied upon the no harm standard in certain prior cases, it was appropriate with regard to the acquisition under consideration "to expand the scope of its review to capture expectations for improvements, e.g., some positive benefits, since [the utility] ETG enters the process with credit ratings below investment grade, restricted access to capital markets, very high interest rates on existing lines of credit, significant prepayment burdens under its gas procurement arrangements, and a serious need to reestablish the trust and confidence of ratepayers, bondholders and investors." Id. at 2, quoting NUI at 6. Board Staff asserts that here, too, in keeping with its longstanding practice of ruling upon the appropriate standard of review on a case-by-case basis, the Board should determine the appropriate standard for this application. Id. at 2.

Board Staff states that the present petition is "of critical importance to the State of New Jersey." Ibid. As it explains: PSE&G is the largest utility in the State; its parent company, PSEG has three other subsidiaries, PSEG Power LLC, PSEG Energy Holdings LLC and PSEG Services Corporation; the petition envisions PSEG's merger into Exelon, which, in turn, by means of its subsidiaries, operates in business segments that it describes as energy delivery, generation and enterprise, in addition to provision of business services; and two of Exelon's energy delivery subsidiaries are PECO Energy Company, which provides energy to several counties in Pennsylvania and Commonwealth Edison Company, which provides electricity to northern Illinois, and through another subsidiary, electric transmission to portions of Indiana. Id. at 3. Board Staff further describes that the merger would result in the largest utility in the industry. Ibid., citing Stavros "The Man Who Would Be King; Exelon Chairman, President and CEO John W. Rowe, on the Proposed Merger That Would Create the Largest Utility in the United States," Public Utilities Fortnightly, May 2005, at 15 ("The Man Who Would Be King"). Board Staff asserts that the proposed merged utility would be the country's largest power generator and a leading national wholesale power marketer with a generation portfolio of about 52,000 MW of domestic capacity, including about 20,000 MW of nuclear generation, and that Exelon Nuclear operates seventeen nuclear reactors, the largest string in the country and the third largest in the world, with the merger proposing to add PSEG Power's three nuclear facilities. Id. at 3, citing "The Man Who Would be King"; [www.exeloncorp.com/generation/nuclear/gn\\_nuclear.shtml](http://www.exeloncorp.com/generation/nuclear/gn_nuclear.shtml); and [www.pseg.com/companies/power/overview.jsp](http://www.pseg.com/companies/power/overview.jsp). Board Staff thus contends that an already vast public utility on the national stage is seeking to merge into itself New Jersey's largest public utility and that the merger represents an unprecedented consolidation of power generation, including nuclear plants. Ibid. Board Staff also asserts that "consideration of this merger must recognize the fragility which underlies delivery of energy in this twenty-first century," and that "the California blackouts/ energy fraud and Enron debacle and the summer of 2003 blackout of the entire Northeast underscore the obligation of regulators to exercise their responsibility under the highest lawful standards." Ibid. Accordingly, Board Staff urges the Board to require the

Joint Petitioners “to demonstrate that this merger show a positive benefit to the people of this State.” Ibid.

### New Jersey Citizen Action

New Jersey Citizen Action (“NJCA”) urges the Board to use a positive benefits standard of review in this and all merger and acquisition petitions that come before the agency. NJCA Initial Brief at 2. NJCA contends that in the past, the Board has used a no harm standard in reviewing similar cases, but that the Board is not bound by statute to use such a standard in all cases. Ibid. NJCA argues that a positive benefits standard is particularly appropriate in this case because of “failed policies to lower rates in New Jersey, the failure of prior acquisitions of New Jersey’s public utilities to produce long-term significant savings to ratepayers, recent labor strife within the utility sector and given the breadth and scope of the petition... and in particular its potential impact on competition.” Id. at 2-3. To satisfy this standard, NJCA claims that the Joint Petitioners must establish that the proposed acquisition will positively impact each prong of the statutory criteria and that such benefits must be significant and sustainable. Id. at 3. NJCA further argues that if positive benefits are found, 100% of those net positive benefits should be passed on to ratepayers in the form of rate reductions. Ibid.

### New Jersey Large Energy Users Coalition and Retail Energy Supply Association

The New Jersey Large Energy Users Coalition (“NJLEUC”) and Retail Energy Supply Association (“RESA”) urge the Board to adopt a “no harm with positive conditions attached” standard. NJLEUC and RESA Initial Brief at 2. NJLEUC and RESA note that while not dispositive herein, the Joint Petitioners will, in fact, have to satisfy a positive benefits standard of proof in the Pennsylvania proceeding because the applicable Pennsylvania statutes were interpreted by the Pennsylvania Supreme Court in York v. Pa. P.U.C., 449 Pa. 136, 295 A.2d 825, 828 (1972), to require those seeking approval of a utility merger to demonstrate that the merger “will affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” Id. at 4-5. NJLEUC and RESA urge that the positive benefits standard would be the more appropriate standard in New Jersey to govern merger transactions involving stock transfers and in particular, this stock transfer where Joint Petitioners propose the formation of the country’s largest public utility. Id. at 5. They argue that the positive benefits standard “would provide a measure of balance between the benefits conferred upon the utilities’ officers and shareholders on the one hand, and its ratepayers, competitors and other stakeholders on the other; a balance that is decidedly absent thus far.” Ibid.

NJLEUC and RESA indicate that they recognize that in the last four electric utility mergers, the Board determined to apply the no harm standard, but they argue that at the same time, the Board has retained the authority to adopt the standard of review it determines will best fit the circumstances of a particular case. Id. at 6. They further point to the recent NUI Order in which the Board determined that, notwithstanding its prior reliance on the no harm standard, in the particular circumstances therein, it was appropriate to expand the scope of review to include expectations regarding the positive benefits that the Joint Petitioners had represented would flow from the merger. Id. at 7. Thus, they argue that “[t]his succession of Orders demonstrates the Board’s authority to adopt the standard of review it determines will best fit the circumstances of a particular case.” Ibid. NJLEUC and RESA further contend that even in those proceedings in which the Board has adopted a no harm standard, the Board has consistently conditioned its approval of merger transactions on the conferring of compensatory or positive benefits to the ratepayers and other stakeholders, to insure that rates, competition, employees and service

quality will not be harmed by the merger. Id. at 7. Therefore, they urge the Board to adopt the same no harm with positive conditions attached standard herein. Ibid.

NJLEUC and RESA argue that the Board, on numerous occasions, has, notwithstanding its adoption of a no harm standard, indicated that it is not precluded from scrutinizing a merger's claimed benefits and that where, as here, Joint Petitioners tout purported benefits that will flow from a merger, the Board has considered the issue of the appropriate treatment of purported merger benefits to be properly before the Board and has examined whether, for example, such benefits have been properly derived and equitably shared with stakeholders. Ibid. NJLEUC and RESA maintain that in every merger proceeding, the Board has accorded lengthy treatment to synergy savings issues to determine whether ratepayers may be harmed by a plan of merger that reduces ratepayer investment in the utility without adequate compensation. Id. at 8-9. NJLEUC and RESA contend that the Board should accord the same type of treatment to synergy savings in this proceeding, in which they assert that PSE&G shareholders will receive a significant premium, so as to closely scrutinize the savings that will accrue from this multi-billion dollar merger. Id. at 9. NJLEUC and RESA also contend that, in addition to the treatment of synergy savings, the Board, in cases applying the no harm standard, has approved a wide array of merger conditions and stakeholder benefits, some of which they assert had little or no relationship with any of the four statutory criteria. Ibid.

In conclusion, NJLEUC and RESA urge the Board to adopt a no harm standard with positive conditions attached. They maintain that such a standard would be consistent with the standard adopted in past merger proceedings, would require the utility to meet its burden of demonstrating that the transaction would not harm competition, rates, employees and adequacy of utility service by reference to the record developed and through conditions assuring that all parties affected by the merger are not harmed thereby and derive some affirmative benefit therefrom. Id. at 12. They further contend that such a "standard would be particularly appropriate in this proceeding, in which concerns regarding the merger's potential effect on market power and competition and attendant impact on rates to customers, and the potential diminution of regulatory control over the State's largest utility are particular [sic] vexing, while the purported benefits to stakeholders are far less clear." Ibid. They reiterate their view that such a standard would provide a measure of balance between the benefits conferred upon shareholders and officers on the one hand, and ratepayers and competitors on the other, and would assure that the merger "makes sense" for all parties affected by it, and not "merely utility shareholders and certain favored individuals within the merged companies." Ibid.

#### **Utility Workers Union of America, AFL-CIO and UWUA Local 601**

Utility Workers Union of America, AFL-CIO ("UWUA") and UWUA Local 601 ("Local 601") urge the Board to adopt a standard that the acquisition (a) will not cause an adverse impact with respect to any of the listed, statutory criteria; and (b) will result in positive benefits for PSE&G customers. UWUA and Local 601 Initial Brief at 2. UWUA and Local 601 argue that a positive benefits standard is appropriate given the high quality of service provided by PSE&G and the risk that an acquisition by Exelon may harm PSE&G customers. Id. at 3. UWUA and Local 601 contend that such a standard should provide an extra measure of assurance that approval of the proposed transaction is in fact consistent with the public interest and that without a showing of positive benefits, there would be little reason for any PSE&G ratepayer to be enthusiastic about the proposed acquisition, or for the Board to risk the potential for acquisition related harms. Ibid. They argue that the proposed acquisition is virtually certain to harm PSE&G ratepayers and workers unless properly conditioned. Id. at 4. They claim that cost-cutting pressures created by the \$2 billion acquisition premium being paid by Exelon to PSE&G

shareholders could jeopardize PSE&G's long record of providing outstanding service at reasonable rates. Ibid. They allege that because of staff cutbacks, including the elimination of up to 950 New Jersey jobs, the quality of service provided to PSE&G customers, as well as the livelihoods of those PSE&G employees who provide those services, will be threatened. Ibid. UWUA and Local 601 argue that such considerations favor the application of a positive benefits standard to the Board's review of the impact of the proposed transaction on customers, as well as the no harm standard with respect to the statutory criteria. Ibid. UWUA and Local 601 also argue that the Board should ensure the no harm standard is applied consistent with its plain meaning so that there will be no adverse impact on any of the statutory factors. Id. at 5. UWUA and Local 601 assert that it appears that the Joint Petitioners may seek to have something less than a no harm standard applied in evaluating the impact of the proposed acquisition on PSE&G employees, and they express concern that the Joint Petitioners are attempting to redefine "no harm" to mean "some harm," which they allege may be due to the Joint Petitioners' plan to cut up to 950 New Jersey jobs. Id. at 6. UWUA and Local 601 are concerned that such a standard would adversely impact both the quality of service and employees of PSE&G. Id. at 7.

## REPLY COMMENTS

### Joint Petitioners

The Joint Petitioners begin their reply by arguing that the legal standard to be applied in any proceeding must not be based on the identity of the parties. Joint Petitioners Reply Brief at 2. They contend that to "set a varying standard based on the applicant's identity is an invitation to inappropriate, even random behavior and possibly unfairness." Ibid. The Joint Petitioners also assert that Board Staff's references to the history of the Board, energy problems in California, and Enron are "irrelevant to the type of reasoned decision-making that the Board should pursue in this matter." Id. at 2 n.1. Referring to the initial briefs of the RPA, Board Staff, and NJCA, the Joint Petitioners argue that the positive benefit standard of review positions set forth therein, which they assert are based on size, are illogical. They claim, however, that, in any event, positive benefits to PSE&G and its ratepayers will result from the proposed transaction. Ibid. The Joint Petitioners further assert that claims that the merger will result in weakening the combined companies' financial position and unacceptable job losses are speculative. Ibid. The Joint Petitioners further argue that even if the transaction, by virtue of its size and significance, would present unusual risks, that is not a basis to apply the positive benefits standard over the no harm standard. Id. at 3. They note that in FirstEnergy, which they assert involved a not insignificant transaction, the Board applied the no harm standard, and they claim that, apart from speculative fears and the fact that this transaction is larger, no party herein has offered any basis to depart from the standard used in that case. Ibid.

The Joint Petitioners also repeat the argument that cases purporting to use the positive benefits standard have generally involved special circumstances not relevant here. Id. at 4. They also argue that the RPA has taken Commissioner Butler's dissent in FirstEnergy out of context. Ibid. In contrasting this case with FirstEnergy, the Joint Petitioners assert that PSE&G's service quality performance has been exemplary, and that PSE&G will remain a separate corporation headquartered in Newark and that Ralph Izzo will remain president and chief operating officer of PSE&G with the necessary authority and resources to ensure the continued provision of safe and adequate service. Ibid.

The Joint Petitioners further argue that while several parties have identified specific benefits provided by the merging parties in prior change of control cases, the fact that the Board may consider the benefits of a transaction does not provide any guidance regarding how a positive

benefits standard would be applied. Id. at 5. They contend that the no harm standard “will allow the Board to consider all impacts of this transaction, including the numerous positive benefits, and ensure continued provision of safe and adequate service at just and reasonable rates.” Ibid.

### **Ratepayer Advocate**

The RPA notes that the majority of the parties who submitted initial briefs agree that positive benefits is the appropriate standard of review to be applied to this merger petition and that only the Joint Petitioners call for a no harm standard of review. RPA Reply Brief at 2-3. Noting that NJLEUC and RESA characterize the standard they propose as “no harm with positive conditions attached,” the RPA asserts that this is equivalent to positive benefits. Ibid.

The RPA contends that while the Joint Petitioners seem to argue that the Board does not have the authority to amend its policy on merger review, it is well settled that the Board has broad powers over all aspects of public utilities subject to its jurisdiction and that this sweeping regulatory jurisdiction includes determination of the applicable standard of review. Id. at 3. The RPA further argues that contrary to the Joint Petitioners’ claim that the Board is changing the rules in the middle of the game, the Board has reasonably decided to handle this issue early in the review process. Id. at 4. The RPA asserts that while the Joint Petitioners seem to argue that the Board only has authority to consider the appropriate standard of review after the development of a factual record, this would place the parties in the undesirable position of having to develop a record and form positions on the issues based on an unknown standard of review. Ibid. The RPA argues that deciding the standard of review now will avoid any confusion while the case is being litigated, rather than “create unnecessary confusion” as the Joint Petitioners suggest. Ibid.

The RPA also asserts that the Board should, in this case, continue its policy of deciding the applicable standard of review by examining the individual circumstances of the merger before it. Id. The RPA notes that the Joint Petitioners acknowledge that the Board, on previous occasions, has explicitly applied the positive benefits standard in cases in which special circumstances existed. Id. at 5. The RPA argues that the Joint Petitioners ignore the fact that their proposed merger presents its own unique set of special circumstances. Ibid. The RPA maintains that special circumstances of the proposed transaction include a seventy-nine billion dollar transaction that would terminate the independence of New Jersey’s largest electric and gas public utility while creating the largest utility in the United States. Ibid. The RPA also notes that the proposed combined utility would be the largest power generator in the country and would maintain over twenty nuclear facilities. Ibid. The RPA contends that such a magnitude is unprecedented both within New Jersey and on a national level and that the potential harm to New Jersey’s ratepayers and other interested parties is likewise unprecedented. Ibid. The RPA alleges that the proposed merger also is unique in that it has the potential to adversely affect not only PSE&G’s customers but also all electricity users in the State, and cites to the Joint Petitioners’ admission that the proposed merger creates significant market power issues that need to be corrected before the merger could be approved. Id. at 6. The RPA concludes that given these unique circumstances, the positive benefits standard is essential to protecting the public interest of New Jersey. Id. at 5-6. The RPA argues that even if the Board accepts the Joint Petitioners’ argument that the positive benefits standard should only be used in unique cases, the Joint Petitioners’ own testimony proves that this case is sufficiently unique to justify using the positive benefits standard. Id. at 6. The RPA also notes that the Joint Petitioners repeat in their initial brief, as set forth in their Verified Joint Petition, that they will show positive benefits in this transaction; therefore, the RPA alleges that it is inexplicable for the Joint

Petitioners to resist evaluation under a standard of review that they repeatedly assert they can satisfy. Ibid. The RPA asserts that the Board would be remiss to rely on the Joint Petitioners' representations of positive benefits without subjecting them to strict regulatory review. Id. at 7.

#### Utility Workers Union of America, AFL-CIO, and UWUA Local 601

UWUA and Local 601 contend that the Joint Petitioners' argument to adopt a "flexible balancing test," which UWUA and Local 601 assert is a watered-down no harm standard,, would impose significant harm upon the interests specified in N.J.S.A. 48:2-51.1. UWUA and Local 601 Reply Brief at 2. They allege that Joint Petitioners cite no case in which the Board has permitted the use of this standard, and they contend that even if it has been used elsewhere, the unprecedented size and scope of the acquisition proposed in the instant proceeding make this acquisition a particularly poor candidate for using such a standard. Ibid. Therefore, UWUA and Local 601 argue that the Board should reject the Joint Petitioners' request for the adoption of a diminished no harm standard. Ibid.

UWUA and Local 601 further argue that the Joint Petitioners' claim that Board precedent precludes application of the positive benefits standard is wrong, and they note that the Board determines the standard of review on a case-by-case basis. Ibid. They assert that the Board has used the positive benefits standard where deemed appropriate and that even where the Board has used the no harm test, it has still referred to the positive benefits test as a possible alternative. Id. at 2-3. Therefore, UWUA and Local 601 argue there is no basis for the Joint Petitioners' argument that a positive benefits standard would "change the rules in the middle of the game." Id. at 3.

UWUA and Local 601 also claim that, contrary to the Joint Petitioners' argument, the Board has provided the requisite clarity for both the no harm and positive benefits standards in numerous cases, and has applied the positive benefits standard in appropriate circumstances. Ibid. To the extent that further guidance is needed, UWUA and Local 601 assert that the Board had delineated twelve factors that bear upon the positive benefits standard in New Jersey Resources Corp. v. NUI Corp., 57 P.U.R. 4th 709 (1984). Ibid.

UWUA and Local 601 further contend that the Board should reject the Joint Petitioners' attempt to rewrite the no harm standard into a flexible balancing test in which the proposed acquisition could be approved notwithstanding that it would result in significant harm to employees and other factors in the statute. Id. at 3-4. They maintain that it is clear from the Board's decisions that the no harm finding is not to be made on an aggregate basis in which harm on one criterion can be disregarded upon a showing of benefits with respect to another criterion, but rather, a separate no harm finding must be made for each of the statutory criteria. Id. at 4. UWUA and Local 601 argue that if the Board adopts the "flexible balancing test," it should require the Joint Petitioners to demonstrate that any alleged positive benefit against which the Joint Petitioners propose to balance acquisition-related harms could not be obtained without the proposed acquisition. Id. at 5. UWUA and Local 601 also argue that a single job cut without significant mitigation would clearly violate the no harm standard, but they contend that the Board does not have to rule on the significance of a single job loss because the Joint Petitioners' example of a single job cut bears no resemblance to the Joint Petitioners' plan to eliminate 950 New Jersey jobs. Ibid.

UWUA and Local 601 also assert that the Joint Petitioners' reliance on Board precedent to support their request for adoption of a standard under which the proposed acquisition may be approved despite a finding that there will be substantial harm to employees is misplaced. Id. at

6. They argue that whether the no harm standard or the positive benefits standard is applied, the Board should, consistent with precedent and the plain meaning of those standards, act to ensure that neither utility employees nor the quality of service is adversely affected, or should ensure that they are positively benefited. Ibid. UWUA and Local 601 conclude by stating that if the Board agrees with the Joint Petitioners' interpretation that the no harm standard would permit the proposed acquisition to go forward even in the face of a finding that the acquisition would result in harms to some of the statutory criteria, the Board should insist upon application of the positive benefits standard. Id. at 7.

## DISCUSSION

The Board has carefully considered the submissions by the parties, as well as the parameters of the proposed transaction itself. Having done so, for the reasons set forth below, the Board FINDS that in considering the requests of the Verified Joint Petition for approval of the acquisition of control of PSE&G as contemplated by the Agreement and Plan of Merger attached to the Verified Joint Petition as Exhibit JP-1C and the transfer of PSE&G's common stock, and in undertaking the evaluation required by N.J.S.A. 48:2-51.1, the Board should utilize a positive benefits standard of review.

With regard to its requests for Board approval of the acquisition of control of PSE&G and the transfer of PSE&G's stock, the Verified Joint Petition indicates that it was filed pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10, and provides information required by N.J.A.C. 14:1-5.10 and N.J.A.C. 14:1-5.14. N.J.S.A. 48:2-51.1 describes four specific factors to be evaluated by the Board when considering a request to acquire or seek to acquire control of a public utility, directly or indirectly. In particular, the statute requires the Board to evaluate the effect of the proposed acquisition on: (1) competition; (2) the rates of ratepayers affected by the acquisition of control; (3) the employees of the affected public utility or utilities; and (4) the provision of safe and adequate utility service at just and reasonable rates. Specifically, N.J.S.A. 48:2-51.1 provides:

No person shall acquire or seek to acquire control of a public utility directly or indirectly through the medium of an affiliated or parent corporation or organization, or through any other manner, without requesting and receiving the written approval of the Board of Public Utilities. Any agreement reached, or any other action taken, in violation of this act shall be void. In considering a request for approval of an acquisition of control, the Board shall evaluate the impact of the acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates. The Board shall accompany its decision on a request for approval of an acquisition of control with a written report detailing the basis for its decision, including findings of fact and conclusions of law.

As to the Verified Joint Petition's proposed transfer of stock, unless authorized by the Board, N.J.S.A. 48:3-10 prohibits the transfer or sale of capital stock by a public utility to another public utility or to any corporation or person if the result of the sale or transfer in itself or in connection with previous sales or transfers would vest in such corporation or person a majority in interest of

the public utility's outstanding capital stock. This statute provides that if, as a result of a proposed assignment, transfer, contract, or agreement for assignment or transfer of capital stock, it appears that the public utility or a wholly owned subsidiary thereof may be unable to fulfill its obligation to any of its employees with respect to pension benefits previously enjoyed, whether vested or contingent, the Board shall not grant its authorization unless the public utility seeking the Board's authorization assumes such responsibility as will be sufficient to provide that all such obligations to employees will be satisfied as they become due.

Nothing in N.J.S.A. 48:2-51.1 expressly suggests or requires how or under what standard of review the Board should consider a request for approval of an acquisition of control and evaluate the impact of an acquisition of control on the four criteria set forth in N.J.S.A. 48:2-51.1. Nor does N.J.S.A. 48:3-10 or any other New Jersey statutory provision set forth an express requirement that the Board use a particular standard of review when considering a proposed acquisition of control of a public utility under the Board's jurisdiction. The Board has long considered the standard of review to be applied in reviewing acquisitions of control on a case-by-case basis and generally has considered whether to apply a no harm standard or a positive benefits standard, also sometimes referred to as a best interests of the public standard. See, e.g., Order of Approval, I/M/O the Petition of NUI Utilities, Inc. (d/b/a Elizabethtown Gas Company) and AGL Resources Inc. for Authority under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 of a Change in Ownership and Control ("NUI"), Docket No. GM04070721 (November 17, 2004), at 5-6. In determining the standard of review to be applied herein, the Board has considered a no harm standard as requiring the petitioners to show and the Board to be satisfied that, at a minimum, there would be no adverse impact on the provision of safe, adequate and proper service at just and reasonable rates and no adverse impact on the other criteria delineated in N.J.S.A. 48:2-51.1, and a positive benefits standard as requiring the petitioners to show and the Board to be satisfied that positive benefits will flow to customers and the State as a result of the proposed change in control, and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1.

In considering the standard of review to be applied herein, the Board is cognizant that, as the Joint Petitioners assert in their Verified Joint Petition and in their written submissions on this issue, and as other parties recognize as well, the Board has determined, on a case-by-case basis, to apply a no harm standard in reviewing a number of recent petitions for approvals of acquisitions of electric utilities.<sup>3</sup> See, Order, I/M/O the Petition of Atlantic City Electric Company and Conectiv, Inc. for Approval of a Change in Ownership and Control ("Conectiv"), Docket No. EM97020103 (January 7, 1998); Order, I/M/O Consideration of the Joint Petition of Orange and Rockland Utilities, Inc. for Approval of the Agreement and Plan of Merger and Transfer of Control ("RECO"), Docket No. EM98070433 (April 1, 1999); Order of Approval, I/M/O the Joint Petition of FirstEnergy Corp. and Jersey Central Power & Light Company, d/b/a/ GPU Energy, for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief ("FirstEnergy"), Docket No. EM00110870 (October 9, 2001); Order of Approval, Petition of Atlantic Electric Company, Conectiv Communications, Inc. and New RC,

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<sup>3</sup>The no harm standard has been applied in evaluating other acquisitions of control as well. See, e.g., Order Approving Merger, I/M/O Joint Petition of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger, Docket No. TM98101125 (March 15, 2000); Decision and Order, I/M/O Joint Petition of E'Town Corp. and Certain Subsidiaries of E'Town and Thames Water Holdings Inc. for Approval of a Change in Control of New Jersey Public Utilities Controlled and Owned by E'Town Corp., Docket No. WM99120923 (October 10, 2000); Order, I/M/O Joint Petition of New Jersey-American Water Co., Inc. and Thames Water Aqua Holdings GMBH for Approval of a Change in Control of New Jersey-American Water Co., Inc., Docket No. WM01120833 (November 26, 2002).

Inc. for Approval Under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 of a Change in Ownership and Control ("PEPCO"), Docket No. EM01050308 (July 3, 2002). In Conectiv, the Board found that the facts of that matter did not demand use of a positive benefits standard, and that the use of a no harm standard in that matter was sufficient to ensure the continuation of safe, adequate and proper service at reasonable rates and adherence to the other requirements of N.J.S.A. 48:2-51.1. Conectiv, at 6. Thereafter, in RECO, at 4, FirstEnergy, at 7, and PEPCO, at 12-13, the Board largely relied upon its ruling in Conectiv, in determining to apply a no harm standard in each of these particular cases.

The Board herein is cognizant, too, that although the Board in the foregoing cases stated that it was utilizing a no harm standard of review, the Board in these matters also considered the appropriate treatment of the acquisition's claimed benefits, including but not limited to, merger savings, and examined whether benefits had been properly derived and equitably shared with ratepayers. See, Conectiv, at 6-8; RECO, at 5; FirstEnergy, at 7; PEPCO, at 24-25. In fact, the Board's regulations governing petitions for approval of a merger or consolidation of a New Jersey public utility with that of another public utility have long required information regarding "[t]he various benefits to the public and the surviving corporation which will be realized as the result of the merger." N.J.A.C. 14:1-5.14(a)(10). Thus, irrespective of the use of a no harm test, the Board has required and examined information on benefits of acquisitions of control as an integral part of its analysis. Indeed, in FirstEnergy, the two-Commissioner majority approved the proposed acquisition at issue therein based, in part, on their findings, among other things, that customers would receive the benefits of merger synergy savings through a reduction in the utility's deferred balance, that FirstEnergy was committed to improving the utility's reliability and customer service performance, and that certain additional merger-related societal benefits would be provided (FirstEnergy, at 20-22, 24-30, 33-35), while Commissioner Butler dissented from approving the merger because the merger, in his view, provided "no real benefit to the ratepayers." FirstEnergy, at 37 (Frederick F. Butler, Commissioner, dissenting).

In NUI, the most recent petition involving an acquisition of control of an electric or gas utility to come before the Board, the Board discussed the above-referenced Orders and the determinations therein to utilize a no harm standard. NUI, at 6. With regard to the acquisition at issue in NUI, the Board determined that it was "appropriate to expand the scope of its review to capture expectations for improvements, e.g., some positive benefits." NUI, at 6. The Board explained that it was so finding because the utility entered "the process with credit ratings below investment grade, restricted access to capital markets, very high interest rates on existing lines of credit, significant prepayment burdens under its gas procurement arrangements, and a serious need to reestablish the trust and confidence of ratepayers, bondholders, and investors," problems which the Board emphasized had been caused by the parent company. NUI, at 6-7. In considering the acquisition's impact on rates under a proposed Stipulation of Settlement, the Board in NUI stated:

In determining whether the proposed merger is in the public interest, a primary concern of this Board is how the proposed merger will impact ETG customers. In evaluating whether a merger will harm customers, the Board tries to determine whether the merger will produce savings, what the cost of achieving those savings will be, and how rates will be impacted as a result of the merger. The Board then seeks to balance the interests of shareholders, who would receive the benefit of any increased share value resulting from the merger, with the interests of customers.

receive the benefit of any increased share value resulting from the merger, with the interests of customers.

[NUI, at 10-1 (emphasis supplied).

The Board found that the Stipulation of Settlement would not result in any harm to the rates of customers and that, in fact, pursuant to the Stipulation, the merger would provide “definitive benefits to customers” and “help to provide some rate stability during a period of volatile energy costs.” NUI, at 11. The Board concluded that, under the unique circumstances presented therein, the Stipulation “represents a fair and reasonable sharing of the potential benefits of the merger between customers and shareholders.” NUI, at 11. It also concluded that subject to the conditions in the Stipulation and Board’s Order, the change in control could be accomplished without any adverse impact on the statutory criteria. NUI, at 21.

While the several foregoing decisions have in some respects considered benefits of acquisitions, in other decisions the Board has explicitly indicated that it was utilizing a positive benefits or best interest of the public test. Prior to the enactment of N.J.S.A. 48:2-51.1, in In re New Jersey Natural Gas Company (“New Jersey Natural Gas”), Docket No. 695-342, 80 P.U.R. 3d 337 (September 11, 1969), the Board used a best interest of the public test in reviewing a stock transfer under N.J.S.A. 48:3-10. In its decision authored by then Board President and later New Jersey Governor Brendan Byrne, the Board explained:

The board of public utility commissioners is charged under N.J.S.A. 48:3-10 with the obligation to pass upon proposed stock transfers by the utility itself where, as here, the transfer will result in the creation of a foreign and wholly owned subsidiary in New Jersey. We think it necessary that the proposed transaction meet the test that it is in the best interest of the New Jersey consumers. In enunciating this test we are not unmindful of a host of decisions which refer to a different test, to wit, that the transaction will not adversely effect the ability of the utility to render safe, adequate, and proper service to customers.

A close analysis of the cited cases does not indicate that the board intends to adopt a negative test. Indeed, where facts have been recited in those opinions, it is quite apparent that those facts satisfy what we will call the “best interest of the public” test. In any event we believe that the legislative intent and the entire philosophy of regulation in New Jersey would require no less strict a test.

[New Jersey Natural Gas, 80 P.U.R. 3d at 339 (citations omitted).]

The Board further explained that within that standard, factors bearing on the public interest include: the effect of foreign or absentee ownership, elimination of competition, the integration of corporate structures, the increased or decreased financial capacities and flexibility, the impact on service standards, interference with regulatory jurisdiction, the promotion of economies, the effect on rates, and the maintenance of financial integrity. New Jersey Natural Gas, 80 P.U.R. 3d at 339.

By Decision and Order on Motions for Emergent Relief in I/M/O the Petition of New Jersey Resources Corporation and New Jersey Natural Gas Company v. NUI Corporation and Elizabethtown Gas Company, (“New Jersey Resources”), Docket No. 8312-1093, 57 P.U.R. 4th

709 (January 31, 1984), the Board again discussed use of a positive benefit standard. New Jersey Resources involved a proxy contest by which NUI Corporation ("NUI"), which wholly-owned a public utility, sought to replace a majority of the board of directors of New Jersey

Resources Corporation ("NJR"), which wholly-owned another utility, with directors who were committed to merge the two utilities. The Board emphasized that in the event that NUI were successful in replacing a majority of the NJR board of directors, the Board would hold plenary hearings to determine whether the proposed merger is in the public interest, and it specified the criteria which would be utilized to evaluate the planned merger.<sup>4</sup> The Board also indicated that the proponents of the merger would have the burden of proof to establish that the merger is in the public interest. Citing New Jersey Natural Gas, *supra*, the Board concluded that "the basic standard that must be established is that the planned merger must be of positive benefit to the public interest and not merely that it would not adversely affect the ability of the merged utilities to provide safe, adequate and proper service at reasonable rates." The Board then enumerated the factors that bear upon such a standard as including:

1. The advantages of combined control as opposed to local management; in this case, the question of "absentee ownership" by out-of-state or foreign corporations does not arise;
2. The effect of the merger upon the competitive situation of the gas utility industry in this State; are there monopolistic concerns with respect to the planned merger?
3. The advantages and disadvantages of the integration of corporate structures;
4. The impact upon the financial capacity and flexibility of the merged utilities. This involves questions of utility capitalization and earnings sufficiency;
5. The reasonableness and cost benefit of the acquisition costs and the expenses of the proxy contest, as well as the appropriate accounting and rate treatment thereof;
6. The question of the maintenance of the financial integrity of two separate operating companies under the umbrella of one proposal [sic] combined utility;
7. The impact of the planned merger on service standards and continued provision of safe, adequate and proper service; this involves the key question of the impact of the planned merger on the assurance and flexibility of gas supply, both under normal and emergency conditions;
8. The effect of the planned merger on rates to be charged to the consumers both now and in the foreseeable future;
9. The effect of the merger on the customer mix and projected demand forecasts;

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<sup>4</sup>The Board notes that New Jersey Resources was voted on at an agenda meeting four days prior to N.J.S.A. 48:2-51.1 being signed into law and the written Order was issued on the same date as N.J.S.A. 48:2-51.1 was signed into law. The Statement accompanying the bill which became N.J.S.A. 48:2-51.1 states that the purpose of the bill is to clarify current law to confirm that the direct or indirect acquisition of control of any public utility requires the prior approval of the Board. Statement, Assembly Bill No. 826 (1984). The Legislature did not incorporate a standard of review in the legislation, and can be presumed to be cognizant that the Board would, as it had, determine the standard or manner by which to conduct its evaluation of a proposed acquisition of control. *Cf.*, Macedo v. Dello Russo, 178 N.J. 340, 346 (2004) (Legislature is assumed to be conversant with judicial constructions of its statutes); Avalon Manor Improvement Ass'n, Inc. v. Tp. of Middle, 370 N.J. Super. 73, 103 (App. Div. 2004) (Legislature is presumed to be aware of relevant case law when it enacts statutes), *certif. denied*, 182 N.J. 143 (2004).

10. The effect of the planned merger on operating costs and the promotion of economies;
11. The impact on the Board's regulatory authority to exercise effective regulatory control on behalf of the public interest; and
12. The effect on obligations to employees with respect to pensions and other benefits pursuant to N.J.S.A. 48:3-7 and N.J.S.A. 48:3-10.

[New Jersey Resources, at 7-8.]

While New Jersey Resources has often been distinguished as involving a standard of review to be applied in the context of a hostile takeover, upon further reflection, the Board finds nothing therein which draws a distinction on that basis in determining the applicable standard of review. Indeed, the Board's reference in New Jersey Resources to "the basic standard," its citation to New Jersey Natural Gas, which did not involve an acquisition of control resulting from a hostile takeover, and the enumerated factors, other than proxy contest expenses, bearing upon the standard of review, lead to the contrary conclusion, *i.e.*, that the Board in New Jersey Resources was enunciating the standard it concluded would be applicable to the proposed merger, irrespective of its derivation. Indeed, from the perspective of customers and the public, the Board finds no basis to distinguish the applicable standard of review solely on the basis of whether or not a proposed acquisition of control has resulted from a proxy contest or other hostile takeover situation. What is of vital import to customers and the State is the effect of an acquisition of control on them subsequent to the acquisition, not how the proposed acquisition was derived prior to its effectuation.

As the foregoing reflects, the Board has, on a case-by-case basis, articulated that it was utilizing a no adverse impact or a positive benefits standard of review in reviewing proposed acquisitions of control of public utilities. The Board now turns to do so with regard to the proposed acquisition of control presently before the Board. The magnitude of the proposed transaction is plain from its description: PSE&G is one of the largest combined electric and gas companies in the United States and is also New Jersey's oldest and largest publicly owned utility. Even prior to the 1911 enactment of public utilities laws and the creation of the Board, the Public Service Corporation was formed over one hundred years ago in 1903 by amalgamating more than 400 gas, electric and transportation companies in New Jersey. Continuing a reference to the "public," which it was established to serve, and to "service," which it was established to provide, it was renamed Public Service Electric and Gas Company in 1948. See <http://www.pseg.com/companies/pseandg/about.jsp>. PSE&G provides electric and gas service in areas of the State in which approximately 5.5 million people, about 70% of the State's population, reside. PSE&G's electric and gas service area is a corridor of approximately 2,600 square miles running diagonally across New Jersey from Bergen County in the northeast to an area below the City of Camden in the southwest. This service area encompasses most of the State's largest municipalities, including its six largest cities, Newark, Jersey City, Paterson, Elizabeth, Trenton and Camden, in addition to approximately 300 suburban and rural communities. The proposed merger would result in an entity with the largest electric utility holdings in the nation and would serve over seven million retail electric customers, as well as two million retail gas customers, including customers residing in Chicago and Philadelphia, the nation's third and fifth most populous cities. See The World Almanac and Book of Facts 2005, at 626. The proposed merged entity also would be the country's largest power generator and a leading national wholesale power marketer with a generation portfolio of about 52,000 MW of

domestic capacity, including about 20,000 MW of nuclear generation. Exelon Nuclear operates seventeen nuclear reactors, the largest string in the country and the third largest in the world, with the merger proposing to add PSEG Power's three nuclear facilities. Both Exelon and PSEG entities control substantial generation fleets in PJM. Thus, as Board Staff aptly asserted, by the proposed transaction, an already vast public utility on the national stage –and the largest public utility in both Illinois and Pennsylvania – is seeking to acquire New Jersey's largest public utility, and the proposed transaction represents an unprecedented consolidation of power generation, including nuclear plants.

The potential risks to New Jersey associated with the size of the combined entity may be exacerbated by the imminent repeal of the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C.A. §79 et seq., a Depression-era statute that regulates multi-state holding companies.<sup>5</sup> PUHCA was enacted in response to the failure of a number of large multi-state utility holding companies. Through various fraudulent practices, the holding companies were able to increase rates for customers of the operating electric or gas utilities, and use the money from these captive ratepayers to prop up failing holding company ventures. The holding companies became so highly leveraged, all supported by the operating utilities at the bottom of the corporate pyramid, that when the banks called in the loans after the stock market crash of 1929, many of these companies quickly went bankrupt. The collapse of the utility holding company empires threatened the public interest by challenging the stability of the provision of utility service, a critical component of the country's infrastructure. PUHCA was enacted to protect investors, consumers and the public from future exploitation of electric and gas utility subsidiaries. See generally, The Public Utility Holding Company Act: Its Protections Are Needed Today More Than Ever, American Public Power Association, Feb. 2003. As part of its analysis of the Verified Joint Petition and mindful of the imminent repeal of PUHCA, the Board must ensure that, if approved, the resulting entity, which would have the largest utility holdings in the United States, transcending multiple states and regions, will not participate in the same pre-PUHCA abuses that occurred in the 1920's and 1930's.

Furthermore, New Jersey's retail electric customers are dependent upon competitive electric supplies acquired through the Board-authorized Basic Generation Service auction, bilateral agreements between customers and suppliers, or through PJM-operated energy and capacity markets. Structurally competitive markets are the necessary predicate for fair market prices paid by New Jersey electric customers, now and into the future. The development and maintenance of structurally competitive markets requires vigilance through market monitoring and the implementation of definitive mitigation measures where the potential or actual exercise of market power is evidenced. Under the subject petition, the acquisition of PSEG by Exelon would explicitly reduce the number of significant competitors in New Jersey wholesale markets by one as the Exelon and PSEG generation subsidiaries join to become a new, combined generation entity. Further, absent mitigation or other measures, the currently substantial market shares of each company in the relevant markets raises not merely the potential but rather the certainty of significantly higher market concentration and the potential future exercise of market power. The Joint Petitioners themselves recognize the problem of market power inherent in the

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<sup>5</sup>The Board notes that subsequent to its consideration of the standard of review at its June 22, 2005 agenda meeting, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, was signed into law on August 8, 2005, and, as had been anticipated, it provides for PUHCA's repeal, effective six months thereafter. Pub. L. No. 109-58, §§1263, 1274(a).

proposed acquisition, *viz.* the Joint Petitioners' accompanying proposal for market power mitigation. *See*, Exhibit JP-6, Direct Testimony of Rodney Frame. Thus, as noted by the Ratepayer Advocate, the proposed merger has the potential to adversely affect not only the customers of the utility directly involved, PSE&G, but also all users of electricity in the State. RPA Reply Brief at 6.

The Board concurs with the Ratepayer Advocate that "[a]s the facts to date have shown, the review of this case is so vital to the interests of all customers in New Jersey, that the use of the positive benefits standard is fully justified." RPA Reply Brief at 6. Furthermore, the Board concurs with its Staff that "consideration of this merger must recognize the fragility which underlies delivery of energy in this twenty-first century. The recent specters of the California blackouts/ energy fraud and Enron debacle and the summer of 2003 blackout of the entire Northeast underscore the obligation of regulators to exercise their responsibility under the highest lawful standards." Board Staff Initial Brief at 3. Indeed, the fragility of energy delivery and consequences to the public were highlighted to this Board by the reliability problems of one of the State's own electric utilities, Jersey Central Power & Light Company. Occurring subsequent to the merger approved in the FirstEnergy Order, the reliability problems caused extensive outages at the New Jersey shore over the July 4, 2003 holiday weekend and led the Board to undertake a reliability audit, appoint a Special Reliability Master, and take certain rate-related actions in order to ensure improvements to service. *See*, Order, I/M/O the Board's Investigation into JCP&L's Outages of the July 4, 2003 Weekend and the Focused Audit of Jersey Central Power and Light Company, Docket Nos. EX03070503 and EX02120950 (March 29, 2004); Decision and Order Adopting Stipulations of Settlements Approving Phase II Rate Increase and Resolving Motion and Cross Motion for Reconsideration, I/M/O the Verified Petition of Jersey Central Power and Light Company for Review and Approval of an Increase in and Adjustments to Its Unbundled Rates and Charges for Electric Service, and for Approval of Other Proposed Tariff Revisions in Connection Therewith, et als., Docket Nos. ER02080506, ER02080507, EO02070417, ER02030173, ER95120633 (May 31, 2005). The Board disagrees with the Joint Petitioners' claim that Board Staff's arguments and considerations in this regard are irrelevant to the Board's decision-making herein. To the contrary, administrative agencies performing quasi-legislative functions are generally entitled to avail themselves of general information and expert knowledge which they may obtain in the performance of day to day administrative activities. City of Passaic v. Passaic County Bd. of Taxation, 18 N.J. 371, 384 (1955). Agencies do not "operate in a vacuum" and are not required "to act upon particular applications with eyes and mind completely averted from a known situation." In re Shore Hills Water Co., 101 N.J. Super. 214, 226-27 (App. Div. 1968). The Board concurs with its Staff that recent blackouts and other events have highlighted the "fragility which underlies delivery of energy in this twenty-first century" and underscore the need to evaluate the proposed transaction under a standard which will best assure that the acquisition of control will be of benefit to customers and the State, notwithstanding the risks involved. Given the fragility of energy delivery and the substantial risks involved with the proposed change in control for which the Board's approval is sought, the Board of Public Utilities, in fulfilling its duties to the public, is compelled to require a showing that the proposed acquisition of control will result in positive benefits to customers and the State of New Jersey.

In considering the standard to be applied in reviewing the proposed acquisition, the Board also is cognizant of the legislative findings in enacting the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq., and finds that its duties under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 to consider the acquisition of control and stock transfer at issue herein should not be considered in isolation but should be considered in pari materia with EDECA and harmonized with the intent expressed therein. See, State in re G.C., 179 N.J. 475, 481-82 (2004); State v. Malik, 365 N.J. Super. 267, 276 (App. Div. 2003), certif. denied, 180 N.J. 354 (2004); Barron v. State Health Benefits, 343 N.J. Super. 583, 587 (App. Div. 2001). In enacting EDECA, the Legislature declared as policy of this State, among other things, to: "Lower the current high cost of energy, and improve the quality and choices of service, for all of the State's residential, business and institutional consumers, and thereby improve the quality of life and place this State in an improved competitive position in regional, national and international markets"; "Place greater reliance on competitive markets, where such markets exist, to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service"; "Ensure universal access to affordable and reliable electric power and natural gas service"; "Provide diversity in the supply of electric power throughout this State"; "Prevent any adverse impacts on environmental quality in this State as a result of the introduction of competition in retail power markets in this State"; "Ensure that improved energy efficiency and load management practices, implemented via marketplace mechanisms or State-sponsored programs, remain part of this State's strategy to meet the long-term energy needs of New Jersey consumers"; "Preserve the reliability of power supply and delivery systems as the marketplace is transformed from a monopoly to a competitive environment"; and "Provide for a smooth transition from a regulated to a competitive power supply marketplace, including provisions which afford fair treatment to all stakeholders during the transition." N.J.S.A. 48:3-50(a)(1), (2), (4), (7), (9), (10), (11) and (12). The Legislature also found and declared, among other things, that "[t]he traditional electric public utility rate regulation which the Board of Public Utilities has exercised over retail power supply in this State requires reform in order to provide retail choice and bring the benefits of competition to all New Jersey consumers." N.J.S.A. 48:3-50(b)(5). Based on these and other findings set forth in N.J.S.A. 48:3-50(a) and (b), the Legislature determined that it is in the public interest to: (1) "Authorize the Board of Public Utilities to permit competition in the electric generation and gas marketplace...and thereby reduce the aggregate energy rates currently paid by all New Jersey consumers"; (2) "Provide for regulation of new market entrants in the areas of safe, adequate and proper service and customer protection"; (3) "Relieve electric public utilities from traditional utility rate regulation" for services provided in a competitive market; (4) Provide electric public utilities "the opportunity to recover above-market power generation and supply costs...associated with the restructuring of the electric industry" subject to certain conditions; and (5) "Provide the Board...with ongoing oversight and regulatory authority to monitor and review composition of the electric generation and retail power supply marketplace in New Jersey, and to take such actions as it deems necessary and appropriate to restore a competitive marketplace in the event it determines that one or more suppliers are in a position to dominate the marketplace and charge anti-competitive or above-market prices." N.J.S.A. 48:3-50(c); In re Public Service Electric & Gas Company's Rate Unbundling, 167 N.J. 377, 383 n.1, cert. denied, 534 U.S. 813, 122 S.Ct. 37, 151 L.Ed. 2d 11 (2001).

The Board finds that the primary thrust of EDECA and the legislative intent manifested therein clearly is that there be improvements and benefits to the State and its consumers from the deregulation and restructuring of the State's electric and gas public utilities, and the provision of access to competitively priced electricity, natural gas, and other energy related services formerly provided only by the State's regulated electric and gas public utilities. Construing N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 in harmony with the subsequently enacted EDECA, and in view of the magnitude of the proposed transaction at issue herein and the concomitant risks and potential ramifications thereof, the Board finds that the proposed acquisition of control and stock transfer should be evaluated by use of a positive benefits standard so as to further promote the receipt by customers and the State of the benefits intended by EDECA.

Moreover, the Board agrees with NJLEUC and RESA (NJLEUC and RESA Initial Brief, at 5) that review of the Verified Joint Petition under a positive benefits standard provides a measure of balance between the benefits anticipated to be derived by the utilities' and other merging parties' officers and shareholders on the one hand, and customers, competitors and other stakeholders. The boards of directors of each merging entity have, respectively, determined that the merger is "advisable, fair to, and in the best interests" of Exelon and its shareholders and PSEG and its shareholders, and recommended that their respective shareholders vote in favor of the issuance of shares of Exelon common stock as contemplated by the merger agreement, and in favor of the proposal to approve the merger agreement, thereby approving the merger. Form S-4 at 9. While the Joint Petitioners indicate that they also have made an analysis of the benefits of the proposed transaction to be derived by their customers and others (See, Verified Joint Petition ¶¶14, 43), the directors and executive officers of PSEG and Exelon have financial and other interests which could have affected their decisions to support or approve the merger. See, Form S-4 at 24, 99-108. The Board finds that as a requisite for Board approval, it is manifestly appropriate, reasonable and in the public interest for a determination also to be made by the Board that the acquisition of control and transfer of stock will provide positive benefits to customers and the State, and to also consider whether there will be benefits for other stakeholders.

Public utilities, unlike most other corporations, are subject to a special obligation to serve the public interest, and their property is affected with a public interest. Matter of Valley Road Sewerage, 154 N.J. 224, 240 (1998). A public utility's franchise is a privilege of a public nature conferred by government to do that which does not belong to the citizens of the country generally by common right, and it provides permission to operate a business, peculiarly of a public nature and generally monopolistic. In re Petition of South Lakewood Water Co., 61 N.J. 230, 238 (1972). Unlike shareholders, customers receiving electric distribution, gas distribution, basic generation and/or basic gas supply services do not have their own vote on whether to approve the merger, yet they will continue to be in a position of having to take at least the distribution service from the utility under the proposed new corporate structure, and thus, be dependent on the utility in its new corporate structure for safe, adequate and reliable service. Just as shareholders are afforded the opportunity to evaluate the benefits and risks of a proposed merger and exercise their votes as they determine to be appropriate in view of their evaluation of the benefits and risks, it is in the public interest for the Board, which has been accorded the role of an independent agency entrusted by the Legislature with responsibilities for administering Title 48, to make an assessment of the benefits of the acquisition of control and stock transfer at issue for the customers and the State, and not only to make an assessment of the negative aspects or risks.

The Board notes that the Joint Petitioners recognize that in NUI, the Board was “arguably justified in wanting to see more than ‘no harm’ when a troubled utility was being acquired [because] ‘no harm’ would do nothing to resolve the serious operational and financial difficulties which threatened to impair service to customers”; however, the Joint Petitioners then argue that in the within matter, there are no such allegations and point to PSE&G as being “a healthy company with investment grade credit ratings, access to the capital markets, economic interest rates on its existing lines of credit, and trust and confidence of ratepayers and the financial community borne of decades of excellent service and financial performance.” Joint Petitioners Initial Brief at 6; Joint Petitioners Reply Brief at 4. The Joint Petitioners also argue that this being a consensual merger, it is not a hostile takeover situation like in New Jersey Resources, and thus, they argue that there is no precedent for applying a positive benefits standard herein. Contrary to the implications of the Joint Petitioners’ contentions, the Board does not believe that it is limited to requiring a showing of positive benefits only when an acquisition involves a utility in need of improvement or a utility which is part of a corporate structure with financial or other difficulties. Nor, as discussed above, does the Board conclude that the standard enunciated in New Jersey Resources is distinguishable because the merger therein derived from a proxy contest. Just as there is an evaluation of whether a merger will be of benefit to shareholders, it is appropriate and in the public interest to evaluate whether there will be any benefits to customers and the State from a change in the current structure, which the Joint Petitioners maintain is serving customers well, to a structure which, on its face, appears to present substantial risks. The Board agrees with the UWUA and Local 601 that “[t]he threats posed by the proposed acquisition...justify the exercise of great care in determining whether, and under what conditions, the proposed acquisition should be approved” and that “[a]bsent a showing of positive benefits, there would seem to be little reason...for the Board to risk the potential for acquisition-related harms.” UWUA and Local 601 Initial Brief at 3.

Evaluating the proposed acquisition herein under a positive benefits standard is, as noted above, consistent with certain earlier decisions of the Board, consistent as well as with the Board’s consideration in the past of benefits of mergers, even when a no harm standard was stated to be the governing standard, and consistent with the Board’s regulations at N.J.A.C. 14:1-5.14(a)(10). As discussed above and as argued by the Ratepayer Advocate and others, even in those proceedings in which the Board has applied a no harm standard, the Board has often conditioned its approval on, among other things, the conferring of compensatory or positive benefits to ratepayers and other stakeholders. Indeed, as noted above, notwithstanding that they assert that the acquisition should be reviewed by determining whether it will not adversely impact upon the four areas specified in N.J.S.A. 48:2-51.1, the Joint Petitioners themselves have indicated in their Verified Joint Petition that the proposed merger “is expected to enhance operations and strengthen the combined ability of Exelon’s utility subsidiaries to provide cost-effective, safe and reliable service and will affirmatively promote the public interest in a number of substantial ways.” Verified Joint Petition at ¶¶14 and 21. According to the Verified Joint Petition, benefits of the merger include: an increased scale and scope in energy delivery, which will result in improved service and reliability; anticipated financial strength and flexibility, which will help ensure that PSE&G has continued access to capital at favorable rates; a sharing of best practices and coordination among operating utilities, which is expected to improve customer service and service reliability; economies, which, after “costs-to-achieve,” will accrue to New Jersey jurisdictional regulated businesses of PSE&G, and help offset the rise in costs of providing reliable electric and gas distribution service, thereby giving rise, over time, to lower rates than would otherwise be the case; an enhanced ability to operate in competitive retail and wholesale markets, which in turn will continue to provide benefits for customers and shareholders; benefits to customers by reducing costs and maintaining or enhancing operations and reliability; more opportunities for employees in a larger, more competitive company;

streamlining and increasing the efficiency of the process of procurement from suppliers; and benefits to the communities served by the combined company by having operating headquarters and a substantial corporate presence in Newark, New Jersey, as well as Chicago, Illinois and Philadelphia, Pennsylvania; and by PSE&G continuing its support of economic development in New Jersey. Verified Joint Petition at ¶14(a) through (g). Even when discussing that the merger satisfies a no harm standard, the Verified Joint Petition discusses benefits. Verified Joint Petition at ¶¶22 through 37. See also, e.g., Exhibit JP-2, Direct Testimony of John W. Rowe, at 6-9, addressing “Benefits of the Merger” and concluding at 21, that “the Merger will create benefits for our customers, employees, shareholders and the communities served by PSE&G, which could not otherwise be achieved”; Exhibit JP-3, Direct Testimony of Ralph Izzo, at 3, stating, among other things, that “[t]he merger should enhance PSE&G’s ability to render safe and reliable service,” and at 6-7, that, as discussed in testimony of William Arndt (Exhibit JP-4), the reduction in PSE&G’s future costs of its electric and gas delivery operations due to the merger “will reduce the amount of any future rate relief required by the utility, thereby providing a direct benefit to customers” and concluding at 13, that “New Jersey will benefit from the Board’s approval of this transaction.” The Joint Petitioners also stated in their initial brief on the standard of review that they will show that there are positive benefits arising from the proposed transaction and, as well, in their reply brief, that “the Joint Petition is clear, and the record will further demonstrate, that the proposed transaction will bring many positive benefits to PSE&G and its ratepayers...” Joint Petitioners Initial Brief at 6; Joint Petitioners Reply Brief at 2.

The Joint Petitioners, nevertheless, argue that “there is no basis, and certainly none at this time” to depart from what they term the “traditional no harm standard,” which they also assert will still allow the Board to consider the numerous positive benefits of their proposed transaction. Joint Petitioners Initial Brief at 6. They claim that “[i]t would be inappropriate, before the development of any factual record, to depart” from the no harm standard, and that there is no evidence supporting the need for a positive benefits standard. Joint Petitioners Initial Brief at 2; Joint Petitioners Reply Brief at 5, 7. Contrary to the Joint Petitioners’ assertions, the Board finds that there already is more than ample information before the Board, by the Verified Joint Petition and the prefiled direct testimony, for the Board to determine that the acquisition of control proposed herein should be evaluated by use of a positive benefits standard. Furthermore, contrary to the Joint Petitioners’ contentions that the Board is somehow “changing the rules in the middle of the game” and departing from its precedent (Joint Petitioners Initial Brief at 2), the Board has, in its prior Orders, determined the applicable standard to be applied on a case-by-case basis based upon an examination of the circumstances of the particular proposed transaction, and that is what the Board is doing herein. The Board also finds that, at this juncture of the proceeding, prior to the commencement of evidentiary hearings, the clarification provided herein that the Board will use a positive benefits standard in evaluating the instant application will enable the Verified Joint Petitioners and indeed all parties a fair and reasonable opportunity to present their positions as to whether or not the standard has been met.


Accordingly, for the foregoing reasons, the Board HEREBY FINDS that in considering the Joint Petitioners’ request for approval of the acquisition of control of PSE&G and the transfer of PSE&G’s common capital stock proposed in the within matter and in undertaking the evaluation required by N.J.S.A. 48:2-51.1, the Board shall utilize a positive benefits standard of review. Pursuant to the positive benefits standard, in order for the proposed acquisition of control and transfer of stock to be approved by this Board, the Joint Petitioners must show and the Board must be satisfied that positive benefits will flow to customers and to the State as a result of the proposed change in control, and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1.

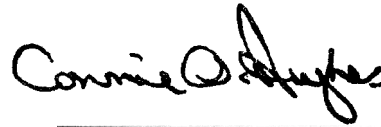
As a final matter, the Board notes that while it has determined the applicable standard for the review of the Verified Joint Petition in this matter, in order to determine and afford an opportunity to be heard as to whether to apply the standard of review set forth above to other matters, the Board will undertake a rulemaking proceeding and will hereafter propose a regulation to govern petitions to the Board for the acquisition of control of public utilities

DATED: 11/9/05

BOARD OF PUBLIC UTILITIES  
BY:

  
JEANNE M. FOX  
PRESIDENT

  
FREDERICK F. BUTLER  
COMMISSIONER

  
CONNIE O. HUGHES  
COMMISSIONER

  
JACK ALTER  
COMMISSIONER

ATTEST:

  
KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within  
document is a true copy of the original  
in the files of the Board of Public  
Utilities

